MEMORANDUM

TO: Elizabeth Gara, Connecticut Water Works Association

FROM: Elizabeth Barton and Taylor Amato, Day Pitney LLP

DATE: March 6, 2018

RE: The January 2018 State Water Plan and The Public Trust Doctrine in Connecticut

On January 23, 2018, the Connecticut Water Planning Council (the "WPC") approved the Final Draft State Water Plan prepared pursuant to Public Act 14-163 (the "Plan). Public Act No. 14-163 is entitled "An Act Concerning the Responsibilities of the Water Planning Council" (the "Public Act"). Following its approval of the Plan, the WPC submitted the Plan to the General Assembly for approval or disapproval pursuant to the Public Act, as amended by Public Act No. 16-137. The Plan is presently before the General Assembly.

I. Introduction

Prior to the WPC's January vote approving the Plan, and following a period allowing for public comment on the June 2017 draft of the Plan, in the January 2018 version of the Plan, the WPC first inserted specific references to "the public trust". These references appear in the Executive Summary of the 616-page Plan and also in Section 2.2.1 of the Plan, entitled "Understanding Connecticut's Water Resource Management Structure," and in Section 6.8.6 of the Plan, entitled "Additional Topics for WPC Discussion" (collectively, the "Insertions").[1]

[1] The June 2017 version of the Plan, as well as the January 2018 version of the Plan, included among the White Papers prepared, reviewed, commented on, and revised during the course of the collaborative plan development process a White Paper (Plan, WP1-12, at pp.2-76 through 2-78) on Connecticut's long-standing Coastal Management Program. In this White Paper, when reviewing agency jurisdiction for purposes of the implementation of the Coastal Management Program, there is reference to the state regulatory jurisdiction line and "the

We understand that there has been support for, and also opposition to, the Insertions, including, in both instances, by organizations and individuals who actively participated throughout what has been identified by the Plan as a one-year "collaborative Plan development process". The Public Act expressly requires that, in preparing a state water plan for the management of Connecticut's water resources, among other requirements, the WPC involve interested parties and "solicit input from" the WPC's statutorily-created Advisory Group. To facilitate the year-long development process, the WPC, through the New England Interstate Water Pollution Control Commission, contracted with CDM Smith and Milone and MacBroom.[2] The WPC acknowledges in the document setting forth responses to the public comments received on the June 2017 draft that "the theme 'public trust' ... was not brought up specifically" during the lengthy and intensive collaborative Plan development process.[3]

Per your request, this memorandum discusses potential legal considerations relating to the Insertions, including in particular the Plan's specific and repeated reference to and reciting of Conn. Gen. Stat. Section 22a-15 of the Connecticut Environmental Protection Act ("CEPA").[4]

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boundary between private and public trust property." During the course of the plan development process, in addition to the multiple opportunities for participation and comment by the general public, there was continual and intensive involvement of the WPC's statutorily-created Advisory Group, the Steering Committee created by the WPC prior to the commencement of the process, the WPC's Policy Subcommittee, and the WPC's Science and Technical Subcommittee. This White Paper, with its reference to traditional public trust lands in Connecticut under an existing regulatory program, is not the focus of this memorandum.

[2] Plan at p. 1-1.

[3] See, Connecticut State Water Plan, Responses to Comments Received, By: CDM Smith, Dated: January 11, 2018 (Responses to Comments) at pp. 1-3.

[4] Conn. Gen. Stat. §§ 22a-14 to 22a-20. Of note, the Plan, including the June 2017 draft, uses the term CEPA when referring to the Connecticut Environmental Policy Act, Conn. Gen. Stat. §§ 22a-1 to 22a-1h. See, Plan at p. Terms-1. The Connecticut Environmental Policy Act, including its inclusion in the Plan, is not the focus of this memorandum.

CEPA became law in 1971. The Plan summarily states that there is a relationship between "water as a public trust" and "the concept of balance". This claimed relationship is not further defined or elaborated upon in the Plan. The Plan simply recites, without further explanation, the text of Section 22a-15, which codifies Connecticut's application of the public trust doctrine to "air, water and other natural resources" of the State.[5]

The WPC offers that, in making revisions to the June 2017 version of the Plan, it "endeavored to only modify the text of the Plan to correct inaccuracies, clarify issues that could be misinterpreted, and note issues that may be worthy of discussion by the WPC."[6] However, except as to perhaps certain of the language added in Section 6.8.6 of the Plan, entitled "Additional Topics for WPC Discussion," this description does not explain or correspond to the Insertions. In Section 6.8.6, the Plan identifies "[w]ater as a public trust in the context of existing statutes and the themes of 'balance between all uses' in this Plan" as being among the "[a]dditional topics offered by readers during the public comment period [on the June 2017 draft] for consideration of the Water Planning Council."[7] The Plan's effort to scope this additional topic in this section references only Section 22a-15 of CEPA, "existing statutes" and Section 2.2.1 of the Plan (which again recites the text of Section 22a-15 of CEPA), making no reference to the history of the public trust doctrine and its application, which dates back to Roman and early English times and, in Connecticut, to the 1800s. This history notably includes an extensive, comprehensive and, at times, arguably conflicting or at least certainly evolving body of case law on the public trust doctrine. Over many, many years, Connecticut courts have ruled on the

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[5] Plan at p. ES-2.

[6] Responses to Comments at p.1-1.

[7] Plan at p. 6-24.

application and interpretation of the public trust doctrine and even its relationship to the use and allocation of Connecticut's resources, including Connecticut's water resources.

As stated at page ES-4 of the Plan, the Public Act "directs the state's Water Planning Council to develop a State Water Plan in accordance with 17 specific requirements." Nowhere in this legislative mandate to the WPC, including in the General Assembly's statement in the Public Act of the 17 specific requirements to be dealt with in a state water plan for the management of Connecticut's water resources, do the words "public trust" appear. The absence of these words from this mandate has significance. From the plain language of the Public Act, it cannot and should not be concluded that this absence means that the public trust doctrine does not exist in Connecticut or that the mandate to the WPC under the Public Act is contrary to or inconsistent with the public trust doctrine as this doctrine has been and continues to be applied in Connecticut. Rather, this absence simply reflects that, consistent with the Public Act's title and the Public Act's content, the General Assembly is identifying the specific responsibilities it is giving to the WPC and these responsibilities do not include the WPC's examination of the application of the public trust doctrine in Connecticut or the WPC's determination as part of the plan development process as to how the public trust doctrine would or should be applied in Connecticut moving forward. In Connecticut, this application of the public trust doctrine has been the province of the courts and the General Assembly. There is no basis to view the Public Act as signaling a transfer of this role to the WPC or an intent to have Connecticut's unified planning program address the application of the public trust doctrine in the future.

The Plan acknowledges the outer bounds of the WPC's responsibilities and the realistic limitations of the Plan. The Public Act directs the WPC to develop a practical, working plan for the management of Connecticut's water resources. The Public Act requires, among other things,

that the Plan include the WPC's identification of modifications to existing laws and regulations which the WPC sees as necessary to implement the recommendations of the Plan. The Insertions do not identify, or even suggest, a need to modify Section 22a-15 of CEPA (if CEPA were properly within the scope of the existing laws and regulations relating to the implementation of the Plan). The Plan states that its goal (as well as the overarching goal of the stakeholders) is to "help improve the balance of water use in Connecticut."[8] The Insertions introduce ambiguity with respect to the Plan's proposed path to this goal. They could be read as, or argued to be, statements that the Plan intends to use (or secure the General Assembly's approval to use) the public trust doctrine in a manner somehow synonymous with or otherwise relating to or justifying "[b]alanc[ing] the use of water to meet all needs."[9] The Plan defines what is meant by "balance" as follows:

> In the Plan, the term "balance" is used to remind decision makers to **consider social, environmental, and economic factors of all uses**, and to ensure that all aspects of planning and decision making are data-driven to the practical extent possible. As with so many components of the Plan, the use of the word "balance" needs to be taken as part of the overall Plan, not necessarily specific to one component, and that "balance" considered during future water management decisions needs to be topic-specific.[10]

This definition cannot be equated with the application of the public trust doctrine, either historically or presently, in Connecticut.

Against the backdrop of how the public trust doctrine has evolved over centuries, including the evolution of the common law of riparian rights, the codification of the public trust doctrine, and the application of this doctrine in Connecticut case law, the Plan's Insertions at the

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[8] Plan at p. ES-2.

[9] Plan at p. ES-2.

[10] Plan at p. 2-51.

eleventh hour are discordant with: the common law public trust doctrine, the General Assembly's declaration of policy in Section 22a-15 of CEPA, and related case law in Connecticut; Connecticut's current water allocation system, including the regulatory schemes integral to this system; and, of particular significance, the Public Act, wherein the General Assembly authorizes and gives direction to the WPC to "prepare a state water plan for the management of the water resources of the state" that complies with specified requirements.

As noted by a recent commentator on the public trust doctrine, "the public trust doctrine is resoundingly vague, obscure in origin and uncertain of purpose; it serves a variety of functions, mimics other doctrines, and for these reasons is not easily researchable."[11] At a minimum, the noted incongruities will likely add complexity, confusion and uncertainty in an already complex and challenging area of the law, which includes rulings by Connecticut courts since at least 1834 on the many and varied questions regarding, for example, the common law public trust doctrine, riparian rights, prescriptive easements, public and private nuisance, Connecticut's regulated system of riparianism, and CEPA. And, if approved by the General Assembly with the WPC's Insertions intact, contrary to the purpose and express language of the Public Act, the Plan, once approved, may be argued to or potentially read by a reviewing court to alter, or signal the General Assembly's intent to alter, the public trust doctrine's application in Connecticut.

The public trust doctrine in Connecticut encompasses water resources. But the Public Act does not delegate the interpretation, application, and evolution of this doctrine in Connecticut to the WPC or the Plan. The Insertions, particularly because they were added on the eve of the

[11] See, Public Trust Doctrine, Air and Water, Chapter 2. Common Law and the Variations, 1 Envtl. L. § 2:20, Rodgers' Environmental Law, December 2017 Update by William H. Rodgers, Jr. and Elizabeth Burleson.

submittal of the Plan to the General Assembly, inappropriately and inaccurately recite a relationship between the application of the public trust doctrine in Connecticut and the WPC's discharge of its responsibilities under the Public Act to "design a unified planning program and budget," to identify data needs that may hinder the ability to implement this planning program, to "examine appropriate mechanisms for resolving conflicts related to the implementation" of the program, to "recommend the utilization of the state's water resources ... in a manner that balances public water supply, economic development, recreation and ecological health," and, should the WPC identify any, to "identify modifications to law and regulations [currently comprising Connecticut's water management system] that are necessary to implement" the recommended unified planning program. If only because there is no General Assembly delegation or authorization to do so, the Plan should not even begin to take on, as it may be arguably doing with the Insertions, a responsibility to consider, and have the Plan reflect or somehow address, the complexities surrounding the public trust doctrine and its application in Connecticut. To do so would be squarely at odds with the Plan's firm assertion that it "does **not** attempt to prioritize any particular water use or water use category over others."[12]

II. The Public Trust: A Complex Legal Doctrine

The public trust is a complex legal doctrine, shaped by decades of common law and litigation. As a general concept, the public trust doctrine applies to those lands, waters and resources that are deemed components of a public trust. The sovereign is the trustee of this public trust, tasked with protecting the public's interest in the trust resources. In Connecticut, long before the passage of CEPA in 1971, there was the common law public trust doctrine,

[12] Plan at p. ES-7.

which the courts applied when addressing respective rights to certain resources of the state, including water.[13]

A. The Sovereign Holds Title to Certain Lands and Waters in Trust for the Public.

The public trust doctrine dates back to the sixth century A.D. and the Roman Civil Code. The public trust "traditionally refers to the body of common law under which the state holds in trust for public use *title* in waters and submerged lands waterward of the mean high tide line."[14] "At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation ... Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States."[15]

Not all lands and waters of the state were held within the public trust. The United States Supreme Court found that "the States, upon entry into the Union, received ownership of all *lands under waters subject to the ebb and flow of the tide.*"[16] As the United States developed, the application of the public trust doctrine expanded to encompass "the lands under *navigable* freshwater lakes and rivers."[17] As trustee, the state protects the public's interest in the title to

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[13] McAllister, Connecticut's Evolving Views of Riparian Rights and the Public Trust, 44 B.C. Envtl. Aff. L. Rev. 29 (2018); Simpson, Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts after *Waterbury v. Washington*, Vol. 8:2 Conn. Public Int. L. J. 85 (2009); Mayland, Navigating the Murky Waters of Connecticut's Water Allocation Scheme, 24 Quinnipiac L. Rev. 685 (2006).

[14] Leydon v. Greenwich, 257 Conn. 318, 332 n.17, (2001) citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988)(Emphasis added); see also DEEP, The Public Trust, available at: http://www.ct.gov/deep/cwp/view.asp?A=2705&Q=323792, updated July 10, 2017.

[15] Shively v. Bowlby, 152 U.S. 1, 57 (1894).

[16] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988)(Emphasis added).

[17] Id. at 479 (1988)(Emphasis added).

those lands and waters for its use and enjoyment. However, the duty of the trustee is not a duty to protect against all impairments of the public trust resources.

Per the United States Supreme Court, this trust:

> devolving upon the state for the public, ... which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining.[18]

The public trust, at common law, requires that the sovereign hold in trust title to tidal and navigable waters, and protect the public interest in those trust resources from substantial impairment. After decades of common law interpretation and application by the courts, there are states, like Connecticut, which have chosen to codify the application of the public trust doctrine. Other states, excluding Connecticut, have amended their respective constitutions, to expressly address the public trust doctrine with respect to the state's natural resources.

B. The Public Trust Doctrine in Connecticut Following the Enactment of CEPA.

In Connecticut (as well as elsewhere), the common law public trust doctrine was traditionally relied upon to protect tidal and navigable waters. The Connecticut Department of Energy and Environmental Protection ("DEEP") describes the public trust area in Connecticut as:

> [t]he submerged lands and waters waterward of the mean high water line in *tidal coastal, or navigable waters* of the state of Connecticut. On the ground, the public trust area extends from the water up to a prominent wrack line, debris line, or water mark.[19]

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[18] Illinois Cent. R. Co. v. Illinois, 146 U.S. 387 (1892) (Emphasis added).

[19] DEEP, The Public Trust, available at: http://www.ct.gov/deep/cwp/view.asp?A=2705&Q=323792 (Emphasis added).

According to DEEP, the application of the public trust doctrine protects certain public interests in these public trust areas. These protected interests are the rights to use or pass over the area.[20] "It is settled in Connecticut that the public has the right to boat, hunt, and fish on the navigable waters of the state."[21] As DEEP states, it is well-established that the public trust doctrine in Connecticut protects the public's right to access and enjoy tidal and navigable waters.[22]

In 1971, the General Assembly codified the application of the public trust doctrine in Connecticut with the enactment of CEPA. Section 22a-15 of CEPA is the introduction to the statutory provisions of CEPA authorizing causes of action for declaratory and equitable relief when there is "unreasonable pollution, impairment or destruction" of the public trust in air, water and other natural resources in Connecticut.[23] Section 22a-15 declares the policy behind CEPA. There are essential terms in CEPA that are not defined. As one early commentator observed, "[n]owhere in [CEPA] are the terms 'public trust' or 'unreasonable pollution, impairment or destruction' defined, it apparently being the intent of the General Assembly to have the courts develop a substantive body of environmental common law through the litigation process."[24] Since 1971, the Connecticut courts have been defining the scope and boundaries of an action alleging a violation of the public trust under CEPA. In Waterbury v. Washington, which is discussed further below, the Connecticut Supreme Court observed,

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[20] Id.

[21] State v. Brennan, 3 Conn. Cir. 413 (1965); see also Orange v. Resnick, 94 Conn. 573 (1920); Adams v. Pease 2 Conn. 481 (1818); Peck v. Lockwood, 5 Day 22 (1811).

[22] DEEP, The Public Trust.

[23] See, Peter A. Kelly, Belford v. New Haven: Erosion of the Private Plaintiff's Standing Under the Environmental Protection Act, 50 Conn. B. J. 411 (1976).

[24] Peter A. Kelly, Belford v. New Haven: Erosion of the Private Plaintiff's Standing Under the Environmental Protection Act, 50 Conn. B. J. 411, 412 (1976).

> [w]hen CEPA was enacted [in 1971] there was significant legislative skepticism regarding the efficacy of the environmental regulatory agencies and, therefore, the legislature evinced an attitude favoring initial judicial, as opposed to initial regulatory, determinations of whether specific questioned conduct constituted unreasonable pollution, impairment or destruction of a natural resource. Concurrent with and subsequent to that enactment, however, the legislature also has enacted numerous environmental regulatory programs ... In order to read our environmental protection statutes so as to form a consistent and coherent whole, we infer a legislative purpose that those other enactments are to be read together with CEPA, and that, when they apply to the conduct questioned in an independent action under CEPA, they give substantive content to the meaning of the word "unreasonable" in the context of such an independent action.[25]

Waterbury v. Washington is a landmark Connecticut case and a decision integral to an understanding of the extent to which the courts have agreed that the state and others may use CEPA to protect public trust waters, thereby redressing "*unreasonable* pollution, impairment or destruction" of the public trust. (Emphasis added.) In Waterbury v. Washington, the Connecticut Supreme Court provides explicit direction on the scope of a permissible CEPA action and defines the limits of the protection that can be pursued under CEPA, thereby construing what the legislature meant by use of the qualifier "*unreasonable*" in the statute.[26]

The Town of Washington and other Connecticut towns along the Shepaug River had challenged the City of Waterbury's operation of a dam and the City's related use of certain surface waters. Washington and other towns along the Shepaug River alleged that the dam's diversion of these waters, among other things, violated CEPA because Waterbury was unreasonably impairing the public's use of the river for "hiking, fishing, swimming, seasonal kayaking and canoeing, and scenic enjoyment."[27] A specific issue before the trial court, and then

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[25] Waterbury v. Washington, 260 Conn. 506, 558-59 (2002).

[26] Id. at 557-60.

[27] Id. at 518.

the Supreme Court on appeal, was whether Waterbury's impounding of the Shepaug River for its water supply needs was an unreasonable impairment of the public trust.[28]

The trial court in Waterbury v. Washington found that the Shepaug River was impaired from May to October, because the flow of water in the Shepaug River was less than the estimated median natural flow in the River without the dam.[29] The Supreme Court agreed with the trial court that "[i]mpairment" of a watercourse "suggests some diminution of the natural flow", concluding that it was "reasonable" that the "impairment of a watercourse ... be judged in relation to its natural flow rate."[30] But the Supreme Court disagreed with the trial court's finding that this impairment was unreasonable, expressly finding that unreasonable as used in CEPA does not mean something more than *de minimis*.[31]

Because Waterbury was in compliance with the Connecticut Minimum Stream Flow statutory provisions, Conn. Gen. Stat. §§ 26-141a and 26-141b, and DEEP's implementing regulations promulgated thereunder (which have since been amended by DEEP to regulate a broader universe of flows), the impairment by Waterbury was not unreasonable and there was not an actionable claim under CEPA. The existing regulatory scheme "provides the applicable standard for determining to what extent" there was impairment under CEPA.[32] As a matter of statutory interpretation, the Waterbury court held that an impairment that abides by applicable laws and regulations dealing with the subject conduct is reasonable and does not violate the

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[28] Conn. Gen. Stat. § 22a-16.

[29] 260 Conn. at 547.

[30] Id. at 548.

[31] Id. at 557.

[32] Id. at 564.

public trust in the affected resource. The Waterbury court further observed that, in the Connecticut Minimum Stream Flow statute, the General Assembly gave DEEP

> detailed guidance concerning the criteria to be used when developing these regulations. For example, [DEEP] is charged with "recognizing and providing for the needs and requirements of public health, flood control, industry, public utilities and water supply, and further recognizing and providing for stream and river ecology, the requirements of aquatic life, natural wildlife and public recreation, and ... considering the natural flow of water into an impoundment or diversion ...." General Statutes § 26-141b.[33]

The Supreme Court concluded that "it is clear that the legislative and regulatory scheme envisions a comprehensive plan to be developed for the regulation of water flow of stocked watercourses in the state."[34] The Supreme Court was not deterred from its conclusion on this point by Washington's position that the stream flow regulations were inadequate, stating that, if DEEP had concluded that its regulations no longer "adequately meet the concerns expressed in § 26-141b, it is free to craft new [minimum stream flow] regulations."[35] Noting that the legislature is "presumed to have created a rational, coherent and consistent body of law," the Waterbury court found,

> it would be anomalous to conclude that the legislature has, as a general matter, enacted an environmental regulatory scheme that runs on two different tracks with respect to the same conduct: one that requires compliance with specific criteria promulgated by a regulatory agency pursuant to a specific legislative enactment; and a second that lodges in a court the determination of whether the same conduct comes within the very general standard of reasonableness, irrespective of whether it is in compliance with those specific criteria.[36]

The Waterbury decision includes the Supreme Court's discussion of the application of the public trust doctrine to the allocation of water resources. Historically, the focus of the common

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[33] Id. at 564.

[34] Id. at 566.

[35] Id. at 571.

[36] Id. at 557-58.

law public trust doctrine was the state, as trustee, holding title to tidal or navigable water.[37] There have been states extending the public trust doctrine to include the allocation of water and, specifically, consumptive water rights.[38] Until relatively recently, however, the application of the public trust doctrine concentrated on tidelands and related areas that are saltwater, not fresh water, resources.[39] The Waterbury court offers its guidance to the trial court on remand, commenting that the application of the public trust doctrine to water allocation must take into account existing riparian rights and then determine whether these common law rights have been superseded by legislation. The Supreme Court noted that, with the passage of the 1982 Connecticut Water Diversion Act, Conn. Gen. Stat. §§ 22a-365 to 22a-377, Connecticut transitioned to regulated riparianism with DEEP determining, in advance, whether new diversions are allowed.[40]

III. Water Rights and Allocation in Connecticut: Now A Regulated Riparian System

The public trust doctrine does not exist in a vacuum. Complex common law, and legislative and regulatory schemes, govern and have governed water allocation in Connecticut. It is essential to an understanding of the public trust doctrine and its application in Connecticut to

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[37] Historically, "[a]t common law, the *title* and dominion in lands flowed by the tide water were in the King for the benefit of the nation." Shively v. Bowlby, 152 U.S. 1, 57 (1894) (Emphasis added); see also Leydon v. Greenwich, 257 Conn. 318 (2001) citing Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988).

[38] See Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419 (1983)(the "Mono Lake case"); United Plainsmen v. North Dakota State Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976).

[39] The public trust and water rights, 1 State Environmental L. § 4:20 (2017) citing Dunning, The Significance of California's Public Trust Easement for California Water Rights Law, 14 U.C. Davis L. Rev. 357, 359 (1980) ("In these coastal or 'salt water' cases, consumptive water rights have not been an issue, since salt water has been unusable for the various consumptive purposes and it exists in virtually unlimited quantities.").

[40] Waterbury v. Washington, 260 Conn. at 590.

consider the broader history of water rights in Connecticut. Connecticut, like many Eastern states, traditionally employed the "riparian doctrine" when allocating water and water rights. Prior to passage of the Connecticut Water Diversion Act in 1982, all surface water uses in Connecticut were subject to the common law rule of riparian rights.[41]

In its basic form, a riparian right is a right to use water (a usufructuary right) arising from ownership of land abutting a watercourse.[42] Two prevailing theories key to water allocation in riparian systems are the natural flow theory and the reasonable use theory. The Waterbury court opined that different theories of riparian rights pertained in Connecticut at different points in time.[43] Per the natural flow theory, "every person owning lands on the banks of rivers has a right to use the water in its natural stream, without diminution or alteration; that is, he has a right that it should flow *ubi currere solebat.*"[44] A companion to the natural flow theory is prescriptive easement law, as reviewed and applied by the Waterbury court to the facts before it. The reasonable use theory is premised upon the idea that "the right to use water... being a common right, must be exercised in a reasonable manner."[45]

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[41] McAllister, Connecticut's Evolving Views of Riparian Rights and the Public Trust, 44 B.C. Envtl. Aff. L. Rev. 29 (2018); Simpson, Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts after *Waterbury v. Washington*, Vol. 8:2 Conn. Public Int. L. J. 85 (2009); Mayland, Navigating the Murky Waters of Connecticut's Water Allocation Scheme, 24 Quinnipiac L. Rev. 685 (2006).

[42] Buddington v. Bradley, 10 Conn. 212 (1834) ("riparian proprietor has annexed to his lands the general flow of the stream, so far as it has not been actually required, by some prior and legally operative appropriation").

[43] Id. at 579.

[44] Ingraham v. Hutchinson, 2 Conn. 584, 593 (1818).

[45] Twiss v. Baldwin, 9 Conn. 291 (1832).

The Supreme Court in Waterbury states that "[u]ntil [the passage of the Connecticut Water Diversion Act] in 1982, Connecticut subscribed to the natural flow theory of riparian water rights."[46] However, in a footnote, the Waterbury court acknowledges that there are commentators who believe that Connecticut was a reasonable use jurisdiction, but maintains its determination that Connecticut was a natural flow jurisdiction.[47] There has been considerable debate as to which theory Connecticut followed over the years, with courts often struggling to define which system is or was in use at a particular point in time.[48] Additionally, groundwater withdrawals have been treated differently, depending on whether or not the withdrawal affects the flow of other groundwater or surface water flows.[49]

The 1982 Connecticut Water Diversion Act created a statewide water allocation program to better manage competing uses of the states' water resources and to improve protection of the state's water resources.[50] The Connecticut Water Diversion Act established a permitting scheme managed and implemented by DEEP, who has promulgated regulations to further effect diversion permitting under the Connecticut Water Diversion Act.[51] In Waterbury v. Washington, the Supreme Court states:

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[46] Waterbury v. Washington, 260 Conn. at 579.

[47] Id. at fn 45.

[48] McAllister, Connecticut's Evolving Views of Riparian Rights and the Public Trust, 44 B.C. Envtl. Aff. L. Rev. 29 (2018); Simpson, Forging Connecticut's Water Policy Future: Registered Diversions, Riparian Rights and the Courts after *Waterbury v. Washington*, Vol. 8:2 Conn. Public Int. L. J. 85 (2009); Mayland, Navigating the Murky Waters of Connecticut's Water Allocation Scheme, 24 Quinnipiac L. Rev. 685 (2006).

[49] Colleens v. New Canaan Water Co., 155 Conn. 477, 487 (1967); Mayland, 24 Quinnipiac L. Rev. at 705-06.

[50] Conn. Gen. Stat. § 22a-366.

[51] Conn. Agencies Regs. §§ 22a-372-1, 22a-377(b)-1, 22a-377(c)-1 - 22a-377(c)-2.

> In 1982, with the enactment of the diversion act, Connecticut made a transition from a common-law riparian rights to a regulated riparian rights state. The major change effectuated by this transition is that now a state agency will determine in advance, what diversions are allowed and to what extent, rather than having trial courts apply common-law riparian rights principles and resolve disputes through litigation.[52]

The White Papers in Section 2.2.1 of the Plan, which is entitled "Understanding Connecticut's Water Resource Management Structure," describe the existing water management structure in Connecticut and, per the Plan, provide:

> an overview of current water and land management strategies and regulatory programs, including but not limited to, water supply (individual water supply plans, WUCCs, Source Water Assessment program, Safe Drinking Water Act, watershed protection, private drinking water wells); water diversion; water quality standards; wastewater (individual municipal facilities plans, Clean Water Act, Water Pollution Control Authorities); stormwater and other non-point pollution sources; aquifer protection; inland wetlands; coastal management; drought management; stream flow; recreational waters; fisheries management; comprehensive state energy strategy, related state, regional, and local plans of conversation and development; and funding and financing.[53]

These are the components of the existing regulated riparian system in Connecticut, i.e., the laws and regulations relating to the implementation of the state water plan as provided in Public Act No. 14-163.

IV. Conclusion

The eleventh hour Insertions to the Plan providing for the WPC's consideration of the public trust doctrine as part of its development and implementation of a unified planning program for water resource management are, as presently stated in the Plan, outside the scope of the WPC's responsibilities as expressly delegated by the General Assembly in Public Act No. 14-163. As stated at page ES-4 of the Plan, the Public Act "directs the state's Water Planning Council to develop a State Water Plan in accordance with 17 specific requirements." The

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[52] Id. at 590.

[53] Plan at p. 2-51.

detailed statement of these requirements and the WPC's responsibilities makes no reference to, and do not include consideration of, the public trust doctrine and its application in Connecticut.

The WPC advises in the Plan that, when preparing the Plan, it responded to the directives of the Act "by reviewing methods by which other states had developed statewide water plans, evaluating current practices, future challenges, and opportunities *within Connecticut's water management framework.*"[54] The Plan is a "repository of consensus-based values of the stakeholders who participated in the development of the Plan."[55] "The Plan does **not** attempt to prioritize any particular water use or water use category over others; that is instream needs and out-of-stream needs are not prioritized ... Likewise, the value of specific uses of water, if currently authorized by state policies and law, are neither advocated nor diminished relative to other uses. Instead, the Plan provides technical information and guiding principles that may be used to inform decisions across the state on a case-by-case basis, or in the form of future legislation."[56]

The application of the public trust doctrine by Connecticut courts and the General Assembly is complex and has been evolving since the 1800s. Section 22a-15 of CEPA codified the application of this doctrine to Connecticut's natural resources, including water, as a preamble to CEPA's provision of an enforcement remedy when there is impairment of the public trust in these natural resources and that impairment is unreasonable.

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[54] Plan at p. ES-5 (Emphasis added).

[55] Plan at p. ES-9.

[56] Plan at p. ES-7 (Emphasis in original).

Public Act No. 14-163 did not either direct or require that the WPC consider the public trust doctrine or that the Plan use "balance founded on public trust".[57] The Public Act did not transfer the responsibility for the application and statutory interpretation of the public trust doctrine in Connecticut. And, as recited above, the language of the Plan itself acknowledges the outer boundaries of the WPC's responsibilities and the practical limitations of the Plan, advising what the Plan does and doesn't do.

The Plan states that its goal is to "help improve the balance of water use in Connecticut."[58] The Insertions reference the public trust in a manner that suggests the public trust doctrine is synonymous with "[b]alanc[ing] the use of water to meet all needs."[59] But as reviewed above, an equitable action under CEPA is inextricably linked to the reasonableness of the impairment being challenged, not the balancing of all uses. A court's determination of reasonableness under CEPA need not require or even involve a balancing of all water needs or, as the Plan suggests, all stakeholder interests, particularly where "the legislature has chosen to enact detailed regulatory schemes circumscribing a party's conduct. There is nothing in CEPA, or in its legislative history, to suggest that CEPA was intended to trump more specific statutes reflecting the legislature's environmental policy in a specific area."[60]

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[57] See, Connecticut State Water Plan, Responses to Comments Received, By: CDM Smith, Dated: January 11, 2018 at p. 1-3.

[58] Plan at p. ES-2.

[59] Plan at p. ES-2.

[60] Waterbury v. Washington, 260 Conn. at 560.

The Plan's reason for citing to, and its reciting of, Section 22a-15 is not clear.[61] The Insertions expressly reference only Section 22a-15 of CEPA, CEPA's declaration of policy. The Insertions are not requirements of the Act and a consideration of the application of the public trust doctrine in Connecticut (which per Section 22a-15 extends to Connecticut's water resources) by the courts and the legislature is not among the WPC's responsibilities under the Public Act or necessary for the development and implementation of the Plan. The Insertions are misplaced, and neither a correction of an inaccuracy nor the clarification of an issue that could be misinterpreted. If only to avoid confusion and any inadvertent misapplication of the public trust doctrine when complying with the directives of Public Act No. 14-163, the prudent course would be to remove the Insertions from the Plan.

[61] The written document responding to the comments received on the June 2017 draft suggests that the impetus behind the addition of the references to the public trust and Section 22a-15 may have been, at least in part, the prevalence of "the theme and support for water as a public trust" among those comments. See, Connecticut State Water Plan, Responses to Comments Received, By: CDM Smith, Dated: January 11, 2018 at pp. 1-3; Plan at p. ES-2 ("One related aspect ... widely brought up during the public comment period following Plan development, is water as a public trust."); Plan at p. 2-51 ("A current water resource management structure topic that was brought up during the Plan's public comment period, which the WPC considers related to balance, is water as a public trust.")